

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
AUG -7 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0072-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
TIMOTHY PHILLIP PENA,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20022179 and CR-20022182 (Consolidated)

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Timothy Pena

Buckeye
In Propria Persona

H O W A R D, Chief Judge.

¶1 After separate jury trials for offenses committed in April and July 2002, petitioner Timothy Pena was convicted of two counts each of aggravated driving under the

influence of an intoxicant (DUI) while his license was suspended or revoked and aggravated driving with an alcohol concentration of .08 or more while his license was suspended or revoked. Pena absconded shortly before the first scheduled trial, and both trials were held in absentia. When Pena was apprehended approximately three years after his first conviction, the cases were consolidated for sentencing. After finding Pena had one historical prior felony conviction, the trial court sentenced him to presumptive, enhanced prison terms of 4.5 years, to be served concurrently. We affirmed his convictions and sentences on appeal. *State v. Pena*, Nos. 2 CA-CR 2006-0269, 2 CA-CR 2006-0270 (memorandum decisions filed Aug. 22, 2007).

¶2 Pena filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and in the petition that followed, he claimed the trial court abused its discretion in failing to adequately investigate his mitigating circumstances and in sentencing him to a presumptive—rather than mitigated—term of imprisonment. Specifically, he alleged the court had sentenced him without first reviewing a court-ordered psychological evaluation that had reported Pena suffered from an “Adjustment Disorder with Depressed Mood” and a history of episodic abuse of alcohol. In addition, Pena claimed the court did not properly weigh, as a mitigating circumstance, the fact that he had been diagnosed with Acquired Immunity Deficiency Syndrome.

¶3 After an evidentiary hearing, the trial court denied relief. The court stated it had considered the mitigating circumstances Pena had presented during his Rule 32

proceeding but found no reason to change the presumptive sentences it had originally imposed. Pena filed a motion for rehearing, which the court also denied.

¶4 In his petition for review, Pena argues that the trial court abused its discretion in sentencing him before considering the report of an evaluating psychologist and in declining to impose mitigated sentences. He also appears to contend he was denied due process in his post-conviction relief proceeding because the presiding judge of the superior court denied his motion for a change of judge for cause. In addition, he asserts new claims in his petition for review, alleging his right to due process was violated because his presentence report was “not submitted in a timely manner” and that trial and appellate counsel were ineffective for failing to contest the court’s imposition of presumptive sentences.

¶5 First, we review the denial of Pena’s request for a change of judge in his Rule 32 proceeding for an abuse of discretion. *See State v. Smith*, 203 Ariz. 75, ¶ 10, 50 P.3d 825, 828 (2002). Section 13-4234(I), A.R.S., provides that a Rule 32 proceeding “shall be assigned to the sentencing judge if it is possible.” Quoting *Liteky v. United States*, 510 U.S. 540, 556 (1994), the presiding judge correctly stated that unfavorable rulings do not warrant a change of judge under Rule 10.1, Ariz. R. Crim. P., unless they “display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *See also State v. Henry*, 189 Ariz. 542, 545, 944 P.2d 57, 60 (1997). We find no abuse of discretion in her

conclusion that Pena had failed to present evidence of such bias in the several motions he filed.

¶6 Second, to the extent Pena raises new claims in his petition for review that were not presented to the trial court, including his claims of ineffective assistance of trial and appellate counsel, we will not address them. *See generally* Ariz. R. Crim. P. 32.9(c)(1)(ii); *see also State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues first presented in petition for review that “have obviously never been presented to the trial court for its consideration”).

¶7 With respect to the trial court’s denial of post-conviction relief for alleged sentencing error, we will not disturb that ruling absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

¶8 Although the trial court granted an evidentiary hearing, Pena’s single claim of sentencing error is precluded by his failure to raise it on appeal. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding post-conviction relief based on any ground “waived at trial, on appeal, or in any previous collateral proceeding”). Accordingly, the trial court properly denied relief. *See State v. Shrum*, 220 Ariz. 115, ¶ 23, 203 P.3d 1175, 1180 (2009) (trial court erred in granting relief on precluded claim).

¶9 Moreover, the court told Pena during the oral argument on his motion for rehearing, “I now know this information. It doesn’t change my belief that [presumptive terms were] the appropriate sentence[s,] given your history.”

¶10 For the foregoing reasons, we grant review, but we deny relief.

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

PHILIP G. ESPINOSA, Presiding Judge

JOHN PELANDER, Judge